NO. 80-1108

In The

Supreme Court of the United States

October Term, 1980

ELIZABETH LOUISE SHARTEL, and MERCANTILE BANK AND TRUST CO., as Executor of the Estate of NINAH DUNLAP WAGNER SHERMAN, deceased,

Petitioners,

vs.

MARY ELLEN BLASINGHAM, CYNTHIA BLASINGHAM, ANN C. STRUNK, JOHN THOMAS WAGNER, HELEN W. BELL, LUM TWILLIGEAR, JR., LAVERNE TWILLIGEAR BROWN, JOHN ROBERT WAGNER, and JOHN MARK WAGNER,

Respondents,

DONALD B. SHORTRIDGE, Executor of the Estate of JOHN HENLEY EVERSOLE, deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

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QUESTION PRESENTED

Where grantors, under a 1912 deed, gave property to their daughter with remainder to her "children," with no evidence of grantors' intention as to whether they desired to include or exclude adoptees of their daughter, and where grantors died in 1919 and 1923, before the adoption in 1927, was it erroneous for the Illinois Appellate Court to follow both statutory and case precedent in finding that grantors intended to include only natural children of their lineal and collateral heirs, rather than adoptive children?

TABLE OF CONTENTS

Page

Additions to the Statement 1

Reasons For Denying The Writ 2

Conclusion 5

TABLE OF AUTHORITIES

CASES:

Belfield v. Findlay, 389 Ill. 526, 60 N. E. 2d 403 (1945) 1

Lynch v. New York, 293 U. S. 51 (1934) 3

O'Conor v. Texas, 202 U. S. 501 (1906) 4

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ADDITIONS TO THE STATEMENT

In 1912, grantors John M. and Sarah E. Wagner, who died in 1919 and 1923, respectively, did not know that their daughter, Nina Dunlap Wagner, would never have natural children nor did they know that she would adopt Petitioner in 1927. There is nothing in the record indicating that they were even acquainted with their daughter's adopted child, the Petitioner herein.

As stated by the Appellate Court (Petitioner's Brief, Appendix 11) in quoting with favor *Belfield v. Findlay,* (1945) 389 Ill. 526, 532, 60 N. E. 2d 403:

> The testatrix . . . is presumed to have made her will in accordance with the statute on adoption in force at the time the will was executed. The presumption is written into the will as much as any part of the will itself.
>
> . . . The state of the Law at the time the will was made, therefore, affords considerable assistance in ascertaining the intention of the testator when such intention is otherwise not clear.

No Illinois law prevented grantors from expressly choosing to include future adopted children of their grantee-life tenant by including such language in their deed, but they chose not to do so.

In 1955, the Illinois Adoption Act was amended to allow adoptees to take from lineal or collateral kindred by right of representation. The statute provided that it should not be used in construing instruments executed prior to September 12, 1955.

REASONS FOR DENYING THE WRIT

1. The federal question of the validity of the Illinois Adoption Statute of 1874, and its construction, was never properly presented to the Trial Court, the Appellate Court, or the Supreme Court of Illinois, and therefore, was not properly preserved for consideration by this Court. The federal question now presented does not appear in any of the pleadings or in the evidence, nor even in the Transcript of Proceedings filed in the Illinois Appellate Court, and therefore, is not a part of the record. The federal question only appears in petitioner's trial brief and ap-

pellate brief, which never became part of the record. Neither the Appellate Court nor the Supreme Court of Illinois responded to the question for the reason, that consideration of this question was not necessary to their decisions. In the case of *Lynch v. New York*, 293 U. S. 51, at 54, Mr. Justice Hughes said:

> But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to *briefs and statements which are not part of the record.* It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Emphasis added.)

2. Petitioner, by challenging the Appellate Court's "construction" of the statute, rather than the validity of the statute itself, has fatally misapprehended the issues. The Illinois Appellate Court's decision followed the mandates as to adoptees of collateral or lineal heirs of the grantors. Any contrary result would have required that the statute be ignored or found invalid; no "construction" of it was necessary.

By attacking only the court's enforcement of the statute, rather than the statute itself, Petitioner has clearly failed to address the proper question. A decision based on Petitioner's issue would not affect the validity of the underlying statute.

3. This case turns upon its own facts and will undoubtedly affect few, if any, other litigants. Petitioner did not—and probably could not—show that a consideration of this case would affect other persons. There surely can be few, if any, cases which would be affected by a decision based on the unique facts and law of this case. No showing has been made that this case is of sufficient scope to warrant consideration by this Court.

4. The result was fair and not erroneous. Petitioner admits in her Petition (page 7), that ". . . the classification here at issue is admittedly not suspect." It must be concluded that grantors' actions were in accordance with the then-existing law, and if the Appellate Court opinion is reversed, then grantors' presumed intentions and desires will have been subverted and thwarted.

Further, and importantly, under the reversion clause in the deed, the Appellate Court has granted Petitioner a one-fifth interest in the 320 acre farm at issue. She has not been deprived of a share of the property, but contrariwise, has been adjudged to share equally with the natural lineal kindred of the original grantors, based on the Appellate Court's decision that the interests vested as of the date of death of the surviving grantor. Therefore, Petitioner has taken a one-fifth interest from her mother by inheritance. The old Illinois Adoption Act did not deny the Petitioner from taking property from her adoptive parents but only from the "lineal or collateral kindred" of her adoptive parents (by the right of representation); in this case, from her adoptive grandparents. Further, this Court should not consider the construction of a state statute in determining title to land, as it is purely a local issue. *O'Conor v. Texas,* 202 U. S. 501 (1906).

5. Lastly, Petitioner has not shown that this decision is in conflict with any decision of this Court or any other Appellate Court.

CONCLUSION

If a case should be taken by this Court on the issue of the rights of adopted persons, this is surely not the right controversy with which to attempt to determine any sweeping issues. The facts of this case are simply too unique, and unlikely to be of any use as a precedent. The Illinois Appellate Court's decision was proper, was fair to the parties, and does not involve a federal or constitutional question. There was no state caused inhibition of grantors' rights "to acquire, enjoy, own, and dispose of property." For the Court to reverse the decision would result in a contrary construction to the grantors' presumed knowledge of the law at the time they signed their deed, and would likely subvert their intent. Certiorari should be denied.

Respectfully submitted,

By: Kip Pope

Attorney for Respondents